

From: Swil, Jonathan
Sent: 05 August 2014 20:58
To: Band, Christa
Cc: McNicholl, Paul
Subject: RE: Project Sparrow
Attachments: Second Sight report; FW: Second Sight Engagement Letter

Importance: High

Follow Up Flag: Follow up
Flag Status: Flagged

Christa

Belinda has sent us the attached final draft of the Second Sight report and asked if we can get back to them tomorrow given Second Sight have "given them" 48 hours to comment. I suggest you use this version to review, rather than the one from Friday as it has got a bit longer. I said we would send our preliminary views generally and thoughts on the "contract section" of the report tomorrow. Belinda had also asked if we could also provide any other thoughts we have on the report more generally but I think more concluded views on that can sensibly wait until the next round of comments for which it appears from Belinda's email there will be another opportunity. What we say about point a) below I think necessarily draws on deficiencies with the report more generally anyway.

By way of reminder, we have been asked to provide any views we have about a) what Post Office can do about the report e.g. to prevent its publication and b) what they can say, especially about section 2, to neutralise it, including what might be put in a draft letter to Second Sight in response to the report. I have copied **Paul** so he can see where our thinking is heading and for him to if necessary develop the relevant part of section b) (highlighted).

For context, Belinda said the gloves are now off and they do not wish to treat Second Sight kindly any longer.

I suggest subject to your view and once you have provided any comments, I turn this email into an email to Post Office, asking whether they want our views in a more formal note and developed in any respects for the next round (I was told this would be an iterative process, so suspect whatever we send tomorrow will need to be changed/developed anyway).

(The email has turned out longer than I had planned so probably should go into a separate note).

Jonathan

a) What we might do about the report

Any steps taken need to be grounded by reference to the engagement terms (attached). These were executed on 1 July 2014.

PO have engaged SS to provide services (albeit not necessarily to prepare this report) so I see limited basis on which to challenge it aside from the engagement terms. For example, even if what is said in the report might be defamatory (I'm not suggesting either way whether it is), it is a confidential report which Second Sight will only be publishing to the Post Office and the Working Group, so there may be difficulties establishing a publication of the report by Second Sight in the relevant sense or causation by them of any loss. Further, launching a claim and/or seeking an injunction on the basis of defamation may also seem like a significant over-reaction and appear overly defensive.

Further, it is difficult to see how PO could obtain an injunction preventing publication on the basis of breach of the engagement terms. There is real scope for arguing that the report and/or significant parts of it fall outside SS's engagement. But there does not appear to be a positive obligation on SS not to prepare a report of this kind. Accordingly, for the reasons below, it seems to me PO's best approach is to make it clear to SS that this report is (well) beyond scope and on that basis threaten:

1) not to pay for it or at least those parts of it most clearly out of scope;

- 2) no longer to co-operate with Second Sight at all; and/or
- 3) to terminate their engagement on 30 days' notice in accordance with cl 4.1 of the engagement terms.

Threatening to abandon the scheme may be a further option of last resort but I think on the basis PO have recently decided to continue with the scheme, and given the reasons for doing so, this is not realistic.

Key provisions of the engagement terms

Cl 2.1 – the Scheme has been set up to resolve Subpostmasters' concerns about "Horizon and associated issues".

Cl 2.2 – SS is a member of the Working Group whose role it is to oversee the Scheme and assist investigating individual complaints.

Cl 2.3 – PO has engaged SS to provide Services to the Working Group in relation to the Scheme.

Para 1 of Sch 1 (Scope of Services) – this defines the Services SS are engaged to provide. These are serving as a Member of the Working Group, advising, as requested by PO or the Working Group, on the format style and content of documents submitted by PO and/or Subpostmaster during the Scheme, investigating specific complaints raised by each Subpostmaster and assisting with reasonable requests made by the Working Group or Post Office. The Services do not expressly mention the preparation of "thematic reports" such as this one.

Para 2 of Sch 1 – SS must conduct the Services in furtherance of the objectives of the Scheme as set out by the Working Group.

Para 4 of Sch 1 – SS is to act independently in providing the Services and assessments or opinions it gives shall be without bias and based on the facts and evidence available.

Para 5.1 of Sch 1 – in providing the Services, SS shall act with the skill and care of qualified experienced accountants and it is acknowledged that matters relating to criminal law and procedure are outside SS's scope of expertise and accordingly SS shall not be required to give an opinion in relation to such matters.

Out of scope work

On the basis of the observations in section b) below (there may well be others), the report or at least significant parts of it is not within the scope of the Services SS have agreed to provide under the engagement terms. In particular:

- The preparation of a thematic report itself is not expressly within the terms of para 1, Sch 1 [although Post Office will need to confirm whether the report has nevertheless been requested by it or the Working Group]. A thematic report does not address or seek to resolve specific complaints raised by each Subpostmaster (as contemplated by cll 2.1-2.3 and para 1 of Sch 1).
- Several sections of the report are not about "concerns with Horizon or associated issues" at all (see cll 2.1-2.3).
- Substantial parts of the report contain assertions and conclusions without much or any factual basis or reasoning and in some cases are merely speculative. They are therefore not based on the facts and evidence available, contrary to para 4 of Sch 1.
- Certain sections arguably betray a bias against PO (contrary to para 4 of Sch 1).
- Sections concerning the Subpostmaster contract and criminal matters in particular (although there are others) are not within the expertise of qualified experienced accountants and in the latter case are, indeed, expressly out of scope (contrary to para 5.1 of Sch 1).

b) What we might say about the report

Section 2 - the contract

2.3: SS say that the contract transfers several financial and other risks to Subpostmasters who may not have understood or appreciated the risks, particularly if they failed to seek independent legal advice before taking up their post.

1) Freedom of contract means Subpostmasters could choose not to enter the contract if not happy with the terms. 2) PO [presumably – **to be confirmed**] did not prevent them seeking legal advice before entering it. 3) Risk allocation is typical of and reasonably expected in contractual arrangements of this kind, such as, by analogy, franchises, particularly where the oversight of and accounting for revenue and costs generated through the Subpostmaster

network is solely or largely within Subpostmasters' control. **[Paul to develop]** 4) Thousands (and the vast majority) of Subpostmasters do not complain about the allocation of risk and have been signing up to it for two decades. 5) The fairness of the risk allocation under the contract is not the subject of any specific complaint **[PO to confirm]** 6) SS are not qualified to comment on the contract.

2.5: SS are of the opinion that the contract is biased in favour of PO. SS have not seen any evidence that PO advises or requires Subpostmasters to seek independent legal advice.

1) See response in respect of 2.3 above. 2) This is mere speculation based not on fact, or by reference to any knowledge or understanding by SS of any industry standard or common expectation. 3) Subpostmasters are in no better or worse position to take legal advice prior to their engagement than any comparable person in their position such as a prospective employee, franchisee, agent for hire etc. No reason why PO should be obliged to advise them or require them to do so. 4) Unless SS can substantiate any instance in which an Applicant's entry into the contract was the subject of any undue influence, unconscionable conduct on the part of PO or any other "unfair" circumstances, then points 1) and 2) in respect of section 2.3 above apply and this is a legally and commercially meaningless assertion. It is suggestive of bias *against* PO by SS.

2.6: SS say there is a risk that appropriate risk mitigation measures may not have been implemented by the Subpostmasters and that Subpostmasters have no choice but to bear the "risk".

1) The risk as to mitigation measures is, appropriately for the reasons above, the Subpostmasters' to bear under the contract, so the first part of this comment is of no consequence and it is not clear what conclusion (relevant to SS's engagement or otherwise) can be drawn from it. 2) It is not clear what "risks" SS refer to in the latter part of this paragraph.

2.8: SS comment on the POID criminal investigation process.

- Commentary on criminal processes is expressly out of scope.

2.10/2.11/2.12 : SS say they have been told by "many Subpostmasters" that they were not given a copy of the contract until long after they had committed to purchase their sub-post office or long after they had started working or at all **[Post Office to comment on this allegation.];** that they have seen no example of any Subpostmaster signing the contract, as opposed to the practice of signing the "Acknowledgement of Appointment" letter; and that Post Office has not retained "in many cases" evidence of the provision of the contract (and of any document having been signed by Subpostmasters).

1) Referring here to many Subpostmasters rather than "Applicants" suggests SS are implying their commentary applies to the Subpostmaster population generally. They are not qualified to make such an implication nor is it within the scope of their engagement, as they are expressly engaged only to deal with complaints to the Scheme. 2) Specific numbers and examples should be given rather than vague assertions 3) SS are, again, not qualified to speculate about the significance or otherwise of the contract not being signed (even if that allegation is correct). Indeed, they offer no conclusions in this regard. Contracts do not need to be signed to demonstrate that they are legally binding or even that their terms have come to the attention of the parties before the parties are said to be bound by them, particularly where an alternative practice such as the "Acknowledgement of Appointment" letter is alleged by SS to be used by PO.

The report generally

1) The report refers to "Subpostmasters" generally rather than "Applicants". See e.g. 2.10, 3.19, 6.3, 21.1.

2) The report relies on bare assertion and lacks examples or statistics, is speculative, and draws unreasoned conclusions. See e.g. 2.3, 2.5, 13.2, 15.2, 16.1, 17.2, 17.4, 19.4, 20.1, 20.3.

3) The report refers to matters outside the expertise of "qualified experienced accountants" or matters which are expressly out of scope. See e.g. section 2, references to high street banks' usage of ATMs (3.5), opinion as to "system design error" with respect to automatic transaction reversals in Horizon (10.3), criminal issues such as sections 13 (Pensions and Allowances) and 22 (Post Office investigations).

4) The report refers to matters that have little or nothing to do with the subject matter of the Scheme— i.e. Applicants' concerns with the functioning of Horizon and associated issues. See e.g. the contract commentary in section 2, ATMs (section 3), Motor Vehicle Licences and the misprinting of bar codes (section 4), cash and stock remittances (section 11), Post Office's data retention policy (section 14), cash withdrawals accidentally processed as deposits and other counter errors (section 16).

These issues indicate or at least may give the impression that the report, contrary to the requirements of Second Sight's engagement terms:

- a) is not intended to reflect only the content of Applications to the Scheme
- b) is not based in fact and on the available evidence
- c) has been prepared by a firm not qualified to draw some or many of the conclusions it seeks to and therefore is beyond its expertise and
- d) is biased against PO.

From: Swil, Jonathan
Sent: 01 August 2014 18:10
To: Band, Christa; McNicholl, Paul
Subject: RE: Project Sparrow

I was in two minds, not wanting to burden Paul with additional reading but it is probably a good idea.

Paul – this was the initial key piece of work we did for Post Office on this matter. It analysed the legal framework between the Post Office and Subpostmaster, in particular the entailment to claim losses from Subpostmasters and the potential claims Subpostmasters might have against the Post Office in the context of the mediation scheme. See in particular section 5 which deals amongst other things with the contract and loss recovery.

Jonathan

From: Band, Christa
Sent: 01 August 2014 18:02
To: Swil, Jonathan; McNicholl, Paul
Subject: RE: Project Sparrow

Jonathan – would it help, do you think, for Paul to see the report which we prepared for the Post Office?

From: Swil, Jonathan
Sent: 01 August 2014 17:59
To: McNicholl, Paul
Cc: Band, Christa
Subject: FW: Project Sparrow

Paul

Thanks for your time earlier. While we were speaking, a draft of the Second Sight report (albeit apparently not the draft it was intended we would get) has come through.

We are being asked to look at section 2 of the report which deals with the Subpostmaster contract. Your input would be helpful on the second aspect of what Post Office are asking (a response to the commentary). The relevant sections of the contract (attached) dealing with "losses" are sections 12(12), 12(13) and 12(17) (pages 39 and 40)- the report sets them and other, supposedly relevant provisions out in any event.

Post Office have not set a deadline but they usually come back to us wanting our advice fairly urgently so please assume we may need to provide our views during the earlier part of next week. Do let me know if that will present an issue and if you need any further information from us. Given what we have been asked, we probably only need to talk through your views. We can then incorporate them into the note we will prepare for this, and perhaps get you to comment before it is finalised.

Many thanks for your assistance. The matter number is L-223746.

Jonathan

From: Rodric Williams
Sent: 01 August 2014 17:17
To: Swil, Jonathan
Cc: Belinda Crowe; David Oliver
Subject: Project Sparrow

GRO

Jonathan,

We have not yet received Second Sight's "Part Two" report, but will forward this to you as soon as it comes in.

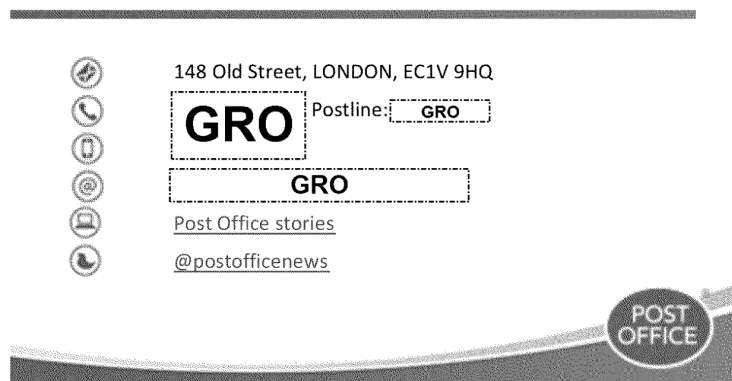
I do however attach an email containing a pdf of the first draft of this report, Section 2 of which sets out SS's "commentary" (for want of a better word) on the standard subpostmaster contract.

As we discussed yesterday, could you please help us prepare a form of challenge to SS's commentary on Section 2, which ideally would compel SS to either remove or neutralise that section from the Report, or failing that, provide a response to the commentary which could be read alongside it.

In case it assists, I also attach an email with the Engagement Letter we have with SS. Para 5.1 of the Schedule may provide a bit of a hook – if SS are required to "act with the skill and care expected of qualified and experienced accountants", to me that means they have agreed not to stray into other areas of expertise, e.g. contract law.

With thanks for your assistance,
Rodric

Rodric Williams | Litigation Lawyer



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